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OCT 24 1946

No. 562

In the Supreme Court of the United States

OCTOBER TERM, 1946

RUTHERFORD FOOD CORPORATION AND THE GEORGE KAISER PACKING COMPANY, PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR RESPONDENT

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MEMORANDUM FOR RESPONDENT

OPINIONS BELOW

The opinion of the district court (R. 150–163) is not officially reported. The opinion of the Circuit Court of Appeals (R. 175–185) is reported at 156 F. 2d 513.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 18, 1946 (R. 185–186). A petition for rehearing was denied August 26, 1946

(R. 203). The petition for certiorari was filed October 2, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether all boners working in an assembly-line production process in petitioners' slaughterhouse are employees of petitioners within the meaning of the Fair Labor Standards Act, notwithstanding contracts which characterize certain of the boners as "independent contractors" and others as employees of the "independent contractors."

STATUTE INVOLVED

The statutory provisions involved are set forth in the Appendix, *infra*, pp. 9–10.

STATEMENT

Petitioners operated a slaughterhouse in which they produced large quantities of boned meat[1] (R. 11–12, 16). The boning operations were performed in a room at the plant, known as the boning vestibule, by workers called "boners" (R. 168). The carcasses to be boned were moved by an overhead rail system through a series of processes by petitioners' employees into the boning vestibule (R. 178). The carcasses were

[1] Each of the petitioners operated the same plant at different times (R. 164). The issues are the same as to both petitioners.

checked, cleaned, and weighed by petitioners' employees in the boning vestibule before being switched onto the boners' detour rail (R. 178). The meat was then removed from the bones by the boners and, as removed, thrown to a trimmer, an employee of petitioners, or into barrels (R. 178). As the barrels were filled they were removed from the boning vestibule by petitioners' employees (R. 178).

The boners were not hired in the same manner as the other workers in the plant who admittedly were employees of petitioners (R. 21). Petitioners entered into contracts (R. 32–39) with one or two boners which provided that they, as "independent contractors," would do the boning at the plant for a specified sum per hundred pounds of boneless beef. The contract contemplated that the "independent contractor" boners would hire, supervise, and pay other boners who would be their employees and not petitioners' (R. 177). The compensation paid by petitioners for boning operations was ordinarily divided equally among all the boners (R. 167).

The district court held that "the relation of employer and employee did not exist between the defendants [petitioners] and the beef boners" (R. 169) and dismissed the Administrator's complaint (R. 171). The Circuit Court of Appeals for the Tenth Circuit reversed, holding that the employment relation should be determined "by

reference to the underlying economic realities rather than by traditional rules governing legal classifications of master and servant on one hand, and employer and independent contractor on the other" and that a consideration of the "underlying economic realities * * * lead[s] to the conclusion that the boners were and are employees" of petitioners (R. 180, 181).

DISCUSSION

We believe the decision of the court below correctly applies the provisions of the Fair Labor Standards Act and should be affirmed in the event of review by this Court. Nevertheless, we do not oppose the granting of a writ of certiorari because of the desirability of obtaining an authoritative determination of the scope of the employment relation under the Act.[2]

Determination of who is an "employer" or "employee" under federal regulatory legislation does not depend upon abstract conceptual considerations. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 129, establishes that the applicability of these terms is determined by the "underlying economic facts rather than technically and exclusively by pre-

[2] The scope of the employment relation under Sections 811 (b) and 907 (c) of the Social Security Act and Sections 1426 (b) and 1607 (c) of the Internal Revenue Code, as amended, is pending before this Court in *United States of America* v. *Albert Silk*, No. 312, certiorari granted October 21, 1946.

viously established legal classifications.[3] However, the approach taken in the *Hearst* decision has not been uniformly followed by the lower courts in dealing with the numerous "employment" cases constantly arising under the Fair Labor Standards Act.[4]

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[3] Additional support for a liberal interpretation of the scope of employment under the Fair Labor Standards Act is to be found in the broad definition of "employ" in Section 3 (g), not contained in the National Labor Relations Act, as including "to suffer or permit to work."

[4] The decisions construing the concept of employment under the Act have been legion. They have applied varied criteria and reached divergent results. *Reconstruction Finance Corp. v. Merryfield*, 134 F. 2d 988 (C. C. A. 1); *Fleming* v. *Arsenal Bldg. Corp.*, 125 F. 2d 278 (C. C. A. 2), affirmed on other grounds, 316 U. S. 517; *Greenberg* v. *Arsenal Bldg. Corp.*, 50 F. Supp. 700 (S. D. N. Y.), affirmed, 144 F. 2d 292 (C. C. A. 2), reversed on other grounds, 324 U. S. 697; *Looney* v. *Albert H. Wetten & Co.*, 7 Wage Hour Rept. 36 (N. D. Ill., 1943); *Mungovan* v. *Manierre*, 6 Wage Hour Rept. 638 (N. D. Ill., 1943); *Keyer* v. *Hope Estates, Inc.*, 53 F. Supp. 1004 (S. D. N. Y.); *Lorenzetti* v. *American Trust Co.*, 45 F. Supp. 128 (N. D. Calif.); *Brennan* v. *Community Service Society*, 6 Wage Hour Rept. 696 (N. Y. C. Ct., 1943); *Barrow* v. *Adams & Co.*, 6 Wage Hour Rept. 1264 (Munic. Ct. N. Y., 1943); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331 (C. C. A. 8); *Woods* v. *Wilkerson*, 40 F. Supp. 131 (W. D. La.); *Keegan* v. *Ruppert*, 6 Wage Hour Rept. 676 (S. D. N. Y., 1943); *Cottrell* v. *Wetterau Grocer Co.*, 4 Wage Hour Rept. 482 (E. D. Mo., 1941); *Brown* v. *Minngas Co.*, 51 F. Supp. 363 (D. Minn.); *Schroepfer* v. *A. S. Abell Co.*, 48 F. Supp. (D. Md.), affirmed on other grounds, 138 F. 2d 111 (C. C. A. 4), certiorari denied, 321 U. S. 763; *Walling* v. *Southwestern Greyhound Lines, Inc.*, 65 F. Supp. 52 (W. D. Mo.); *Walling* v. *DeSoto Creamery & Produce Co.*, 51 F. Supp. 938 (D. Minn.); *Bush* v. *Wilson & Co.*, [illegible] Kan. 80, 138 P. 2d 457; *Mosier* v. *Retail*

The circuit courts of appeals have usually recognized "economic realities" to find the existence of an employment relation under the Act, whatever the label used in the contract between the parties, where there is a direct contract between the "employer" and the "employee." *Fleming* v. *Palmer*, 123 F. 2d 749 (C. C. A. 1), certiorari denied, 316 U. S. 662 (members of cooperative); *Walling* v. *American Needlecrafts, Inc.*, 139 F. 2d 60 (C. C. A. 6) (independent contractors); *Southern Ry. Co.* v. *Black*, 127 F. 2d 280 (C. C. A. 4) (licensees). But cf. *Walling* v. *Plymouth Mfg. Co.*, 139 F. 2d 178 (C. C. A. 7), certiorari denied, 322 U. S. 741 (co-partners). The holding of the court below that the boilers with whom petitioners made their contracts are employees of petitioners, despite the contracts' characterization of them as "independent contractors," is therefore in accord with the weight of authority.

Credit Co., 5 Wage Hour Rept. 336 (D. Kans., 1942); *Passman* v. *Retail Credit Co.*, 5 Wage Hour Rept. 401 (D. Kans., 1942); *Molina* v. *Rodriguez*, 5 Wage Hour Rept. 259 (D. P. R., 1942); *Van Hee* v. *Breuer*, 8 Wage Hour Rept. 1084 (N. D. Ohio. 1945); *Whatley* v. *Great Southern Trucking Co.*, 123 F. 2d 143 (C. C. A. 5); *Wilson* v. *Shuman*, 140 F. 2d 644 (C. C. A. 8); *Walling* v. *Jacksonville Terminal Co.*, 148 F. 2d 768 (C. C. A. 5); *Walling* v. *Norfolk Southern Ry. Co.*, 6 Wage Hour Cases 252 (E. D. N. C., 1946); *Walling* v. *T. Buettner & Co.*, 5 Wage Hour Rept. 279 (N. D. Ill., 1942), reversed on other grounds, 133 F. 2d 306 (C. C. A. 7), certiorari denied, 319 U. S. 771; *Walling* v. *Wolff*, 63 F. Supp. 605 (E. D. N. Y.); *Fleming* v. *Demeritt Co.*, 56 F. Supp. 376 (D. Vt.); *Nelson* v. *Kuepper Favor Co.*, 4 Wage Hour Rept. 699 (N. D. Ill., 1941); *Walling* v. *Sieving*, 9 Wage Hour

Where an intermediate person is designated as the "employer," however, the circuit courts of appeals have shown greater reluctance to penetrate contract forms and in some cases have engrafted limitations of a technical character upon the statutory definition of "employ" as including "to suffer or permit to work." *Bowman* v. *Pace Co.*, 119 F. 2d 858 (C. C. A. 5); *Walling* v. *Sanders*, 136 F. 2d 78 (C. C. A. 6); *Helena Glendale Ferry Co.* v. *Walling*, 132 F. 2d 616 (C. C. A. 8). The *Bowman* and *Helena Glendale* cases adopt the view that an employment relationship exists within the meaning of the Act only if there is an express or implied obligation to pay wages

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Rept. 356 (N. D. Ill., 1946); *Walling* v. *Todd*, 52 F. Supp. 62 (M. D. Pa.); *Gross* v. *Grissom*, 5 Wage Hour Rept. 498 (N. D. Miss., 1942); *Domenech* v. *Cities Delivery Express*, 5 Wage Hour Rept. 562 (D. P. R., 1942); *Automobile Banking Corp.* v. *Willison*, 181 Md. 118, 28 A. 2d 864; *Soto* v. *La Plata Sugar Co.*, 6 Wage Hour Rept. 943 (D. P. R., 1943); *Walling* v. *Merchants Police Service, Inc.*, 59 F. Supp. 873 (W. D. Ky.); *Dugas* v. *Nashua Mfg. Co.*, 62 F. Supp. 846 (D. N. H.); *Walling* v. *New Orleans Private Patrol Service*, 57 F. Supp. 143 (E. D. La.); *Thompson* v. *Daugherty*, 40 F. Supp. 279 (D. Md.); *Magann* v. *Long's Baggage Transfer Co.*, 39 F. Supp. 742 (W. D. Va.); *Holmes* v. *Industrial Cotton Mills Co., Inc.*, 64 F. Supp. 20 (W. D. S. C.); *Creekmore* v. *Public Belt R. R. Comm.*, 5 Wage Hour Rept. 653 (E. D. La., 1942), affirmed, 134 F. 2d 576 (C. C. A. 5), certiorari denied, 320 U. S. 742; *Matlock* v. *Sanderson & Porter*, 6 Wage Hour Rept. 917 (Ark. Cir Ct., 1943); *Dennis* v. *Equitable Equipment Co.*, 7 So. 2d 397 (La. Ct. App., 1942); *Mitchell* v. *Shefford Cheese Co.*, 9 Wage Hour Rept. 321 (M. D. Tenn., 1946); *Collier* v. *Rural Educational Assn.*, 7 Wage Hour Rept. 151 (Tenn. Ch. Ct., 1943).

apart from the statute.[5] The *Sanders* case makes the existence of the relationship depend upon the right to hire and fire. Since in the instant case petitioners were under no contract obligation to pay wages to the boners "employed" by the "independent contractor" boners, and petitioners had no contractual right to hire or fire such employees, the holding of the court below is inconsistent with the theories of the above decisions. In view of the different approaches of the circuit courts of appeals and the district courts, the importance of an authoritative clarification of the proper tests of the employment relationship under the Fair Labor Standards Act seems clear. Accordingly, we do not oppose the granting of a writ of certiorari.

Respectfully submitted.

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OCTOBER 1946.

[5] *Walling* v. *The Nashville, Chattanooga & St. Louis Ry.* and *Walling* v. *Portland Terminal Co.*, Nos. 335 and 336, certiorari granted October 14, 1946, present a narrow phase of this problem.

APPENDIX

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201 et seq:

SEC. 3. As used in this Act—

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

* * * * *

(e) "Employee" includes any individual employed by an employer.

* * * * *

(g) "Employ" includes to suffer or permit to work.

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * *

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

SEC. 11.

* * * * *

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

U. S. GOVERNMENT PRINTING OFFICE: 1946